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JUN 16

In the Supreme Court of the United States

No. .....

NATHANIEL WARDELL EDWARDS,
Petitioner,

VS.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES

The petitioner, Nathaniel Wardell Edwards, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the Order entered against him on April 24, 1972, by the United States Court of Appeals for the Sixth Circuit in the case of *United States of America* v. *Nathaniel Wardell Edwards and Wardell Pegram* (No. 71-1977) affirming the judgment of the United States District Court for the Middle District of Tennessee in *United States* v. *Edwards* (No. 14,613).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported and is printed in the Appendix hereto, infra, Appendix A (pp. A1).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether a Federal criminal conviction may rest upon evidence and information obtained as a result of a one hour detention and search by a local law enforcement officer who was suspicious of the petitioner's activities but knew of no federal or state crime being or having been committed.

REASON CERTIORARI SHOULD BE GRANTED

Petitioner feels certiorari should be granted for several reasons.

First, this case presents an extremely serious question of the right of a police officer to detain for investigative purposes persons about whom he is suspicious but has no direct information concerning wrongdoing. It would seem this activity should not be allowed to continue.

Secondly, the Sixth Circuit in its consideration, ignored the issue presented merely holding any error was harmless, which position cannot be sustained by the facts.

CONSTITUTIONAL PROVISIONS AND STATUTES RELIED UPON

Constitution of the United States, Amendment IV:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Constitution of the United States, Amendment V:

"No person shall be . . . deprived of life, liberty or property, without due process of law; . . . ."

Tennessee Code Annotated:

40-803. Grounds for arrest by officer without warrant. —An officer may, without a warrant, arrest a person:

(1) For a public offense committed or a breach of the peace threatened in his presence.

(2) When the person has committed a felony, though not in his presence.

(3) When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed it.

(4) On a charge made, upon reasonable cause, of the commission of a felony by the person arrested. [Code 1858, §5037; Shan., §6997; Code 1932, §11536.]

STATEMENT OF CASE

Petitioner Nathaniel W. Edwards was indicted in a five count indictment (App. B, p. A2) along with co-defendants, Wardell Pegram, Moses Polk, Jr. and Thomas R. McCullough. Polk was acquitted by the jury in all counts in which he was mentioned and McCullough failed to appear for trial and is now fugitive.

Petitioner Edwards was convicted on Counts 1, 4 and 5. Count One was the conspiracy count and charged eleven (11) overt acts; it generally alleged conspiracy to violate Title 26, U.S.C. governing manufacture of whiskey. Count Four charged possession of 1400 pounds of sugar intended for violation of Chapter 51, Title 26. Count Five charged possession of a 1958 Mercury Automobile intended for use in violation of Chapter 51, Title 26, U.S.C.

Co-defendant Pegram was convicted on Counts 1, 2, 4 and 5. Count Two charged Pegram with possession of a still not registered under Title 26, U.S.C., §5178(a).

Count Three of the indictment was dismissed by the Court. It charged co-defendant Pegram with possession of a 1960 Chevrolet automobile intended for use in violation of Chapter 51, Title 26, U.S.C.

Petitioner Edwards was sentenced to two years on Count One under provisions of §4208(a)(2) of Title 18. He was placed on five (5) years probation under Counts Four and Five after he is released from custody under Count One.

Appeal was duly perfected to the United States Court of Appeals for the Sixth Circuit. On April 24, 1972, the Circuit Court affirmed the conviction. Application was seasonably made to this Court to extend the time to file

this petition for Writ of Certiorari. An Order was granted by Justice Potter Stewart on May 22, 1972, extending the time to and including June 23, 1972.

STATEMENT OF THE FACTS

At or about 7:45—8:00 o'clock P.M. on April 2, 1970, Officer John Behaylo, Sr. of the Nashville Metropolitan Police Department, Nashville, Tennessee, observed Edwards, Pegram and Polk unloading 100 pound bags of sugar from a 1958 Mercury into a 1962 Chevrolet pickup truck (App. C, p. A9). The officer detained the men approximately one hour until Federal ATF Agents arrived (App. C, p. A11). The officer had no warrant for any of the men (App. C, p. A10), but maintained he knew Pegram and Polk and that they had been in the whiskey business (App. C, p. A13). He, however, admitted he didn't specifically know about either man ever manufacturing whiskey (App. C, pp. A15, A16, A17).

He testified he detained the men until he could "find out what was going on, ..." (App. C, p. A10). He admitted he called a good many officers trying to find out something about the sugar, and he further admitted he talked to his sergeant, he tried to contact the vice squad but he couldn't get them, and, finally he got hold of some Federal Authorities (App. C, p. A17). No State felony or misdemeanor was being committed in the presence of this officer and there is no such claim made (App. C, pp. A11, A12).

The officer did not ever state that he ever knew the action of the appellants was a Federal offense.

This arrest and seizure led directly to the charge of overt acts 4, 5, 6 and 7 of Count One of the indictment and also Counts Four and Five. It also probably led to the

investigation which culminated in Count Two of the indictment.

Co-defendant Pegram was also observed in and about a still in Williamson County on April 30, 1970 and May 1, 1970. Appellant admitted it was his distillery when arrested (App. C, p. A18).

Petitioner Edwards filed a joint Notice of Appeal with co-defendant Pegram.

Objections to the above evidence and testimony were made both before and during trial (App. C, pp. A18-A19).

ARGUMENT

The detention of the petitioner by the Metropolitan Police Officer was an arrest within the legal meaning of the term even though the officer maintained he had not "arrested" the subjects, but merely detained them (App. C, p. A8). *Long* v. *Ansell*, 68 F 2d 386, 63 App. D.C. 68, 94 ALR 1466. They were detained at the scene for approximately one hour (App. C, p. A11), appellant Edwards being called across the street by the officer (App. C, p. A16).

There can be no doubt that without the arrest the ATF Agents would not have been involved, as the officer admitted they came after they were notified (App. C, pp. A17-A18). Thus, the question is reduced to "Whether the Metropolitan Officer had probable cause to arrest and detain the appellants?"

Probable cause for arrest is defined as the facts and circumstances within the arresting officer's knowledge and of which he had reasonable trustworthy information, which are sufficient in themselves to warrant a man of reasonable caution in the belief that an offense has been or is being

committed. *Brinegar* v. *U. S.*, 338 U.S. 160 at 175. It has been more simply stated that "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed". *Henry* v. *United States*, 361 U.S. 98, at 102.

What actual facts were known to the officer?

1. Sugar was being loaded from an auto to a truck in 100 pound bags.

2. It was 7:45 to 8:00 p. m.

3. The officer had some vague idea that two of the three men involved had been in some manner connected to illegal whiskey.

A. Obviously the per se loading of sugar in 100 pound bags from an auto to a truck is not illegal or even unduly suspicious.

B. The hour was not unusually late nor the location such as to give rise to the probability of illegal activity.

C. To justify probable cause under the facts here then the knowledge or lack of knowledge of the officer is of paramount importance for it must be relied on to tie the other facts together and justify the arrest and resulting search and seizure.

Although the officer stated catagorically that he knew Polk and Pegram had been involved in making whiskey (App. C, pp. A14-A15), he said upon close examination he knew they ran with people who engaged in stills and "stuff" (App. C, p. A15). He had no knowledge that Polk had been arrested for manufacturing whiskey (App. C, p. A15). He stated he knew Pegram had been arrested for possession of whiskey (App. C, pp. A15-A16). Upon

further examination, he was unable to state specifically any actual knowledge (App. C, p. A17).

The last few questions of his examination on September 14, 1970 by defendants' attorney are particularly enlightening in the area

> "Q. But, now, do I understand you correctly now it is your testimony that you had some information about Mr. Polk and Mr. Pegram maybe possessing some liquor but you had no information about either one of them ever manufacturing any, is that right?
> "A. Yes, sir, they had been active in the liquor business I will say this, I mean, either transporting it, possessing it or manufacturing it in some way.
> "Q. But you didn't know anything specifically about either one of them ever manufacturing any whiskey?
> "A. No, sir.
> "Q. And you don't know whether—had you ever arrested Wardell Pegram?
> "A. No, sir.
> "Q. And the whiskey you had heard about, you did know to your own knowledge whether the Federal Tax had been paid on it or whether it hadn't did you?
> "A. Not at the particular time, no, sir.
> MR. QUILLEN: That is all."

It seems clear that the officer was suspicious but unable to detect any specific crime being committed. He admitted that he didn't know of any State or Municipal crime being committed in his presence (App. C, p. A12). Nor did he state he even knew of any Federal crime being committed. There is no place in the record indicating he knew anything about Chapter 51, Title 26, U.S.C., §5601 (a)(1), (a)(2), (a)(4), (a)(7), (a)(8), (a)(10), and/or (a)(11).

His was an illegal arrest detaining the appellants until he could figure out what they were doing and what to do. This is additionally evidenced by the fact that he contacted his sergeant, the vice squad and finally Federal authorities. He thought he had something, but didn't know what.

As he lacked probable cause to act, the arrest and resulting evidence was obtained in violation of the Fourth Amendment to the United States Constitution and applied to the State and its officers through the Fourteenth.

Tennessee law is quite clear as to when one of its police officers may arrest citizens without a warrant. Under T.C.A.40-803:

"An officer may, without a warrant, arrest a person:

1. For a public offense committed or a breach of peace threatened in his presence.
2. When the person has committed a felony, though not in his presence.
3. When a felony has in fact been committed, and he has reasonable cause for believing the person arrested to have committed.
4. On a charge made, upon reasonable cause, of the commission of a felony by the person arrested. (Code 1858 §5037, Shan.; §6997; Code 1932 §11536."

Numbers 2, 3 and 4 could not apply as they go only to felonies and admittedly the appellants were not in violation of any State law amounting to a felony. Number 1 could not apply as he knew of no public offense nor was a breach of peace threatened in his presence. His action, therefore, was purely beyond his lawful authority and thus illegal and the resulting search, seizure and subsequent

information was tainted and, therefore, inadmissible under the "fruit of poisonous tree doctrine". *Wong Sun* v. *United States*, 371 U.S. 471.

The possession of the sugar was at most a misdemeanor under Federal law, Chapter 51, Title 26, U.S.C., Section 5601 (a) (1). The Fifth Circuit case of *Clay* v. *United States*, 239 F 2d 196, explores the area of arrest and searches and seizures without a warrant for felonies and misdemeanors under Federal jurisdiction and holds that for the purposes of arrest without a warrant, in order for a misdemeanor to have been committed in the presence of an officer, it is necessary that the officer has evidence, by his senses, sufficient to induce a belief in him as to the commission of such misdemeanor. *Clay, supra*, at 201-02. *Clay* further holds at 202 that if an officer making a search and seizure without a search warrant, does not in fact at the moment of his arrest of defendant, entertain a genuine good faith belief of the fact that defendant has committed a felony, then the search is itself unlawful as lacking an indispensible ingredient which would excuse issuance of a search warrant by a magistrate.

The officer in the case at bar had neither State nor Federal authority for his action.

It appears that the 1959 United States Supreme Court decision in *Henry* v. *United States*, 80 S.Ct. 168, 361 U.S. 98 involved a very similar case and might be used here to further support petitioner's contentions.

In the *Henry* case, there was a theft from an interstate shipment of whiskey. F.B.I. agents received information which caused them to suspect and follow one Pierotti. Pierotti and Henry were seen loading some boxes into an automobile in an alley on several occasions. The officers did not know the contents of the boxes. They

stopped the automobile, searched the automobile and found stolen interstate merchandise other than the whiskey. The Court held that there was an arrest when the agents stopped the car. *Henry* v. *U. S., supra,* at 171.

> "When the officers interrupted the two men and restricted their liberty of movement, the arrest, for purposes of this cause, was complete." *Henry* v. *U. S., supra,* at 171.

The Court then concluded that the question was whether the agents had probable cause. The Court further stated:

> "Under our system, suspicion is not enough for an officer to lay hands on a citizen. It is better, so the Fourth Amendment teaches, that the guilty sometimes go free than that citizens be subject to easy arrest." *Henry* v. *U. S., supra,* at 171.

The fact that after the State officer stopped and restricted the petitioner, he discovered what he later learned to be a misdemeanor violation of Federal law, which violation the record does not show he was even aware of at the time of arrest. He admitted he knew of no State law being violated and remained silent as to any knowledge of the Federal Statute that could apply. Certainly the cases are abundantly clear that what transpired at or after the arrest is inadmissible to give justification for the arrest. *Henry* v. *U. S., supra,* at 171, 172.

The petitioner, through his counsel, has continually objected to the arrest, search and seizure, both through Motion to Suppress (App. D, p. A20) and oral motions at trial (App. C, p. A19).

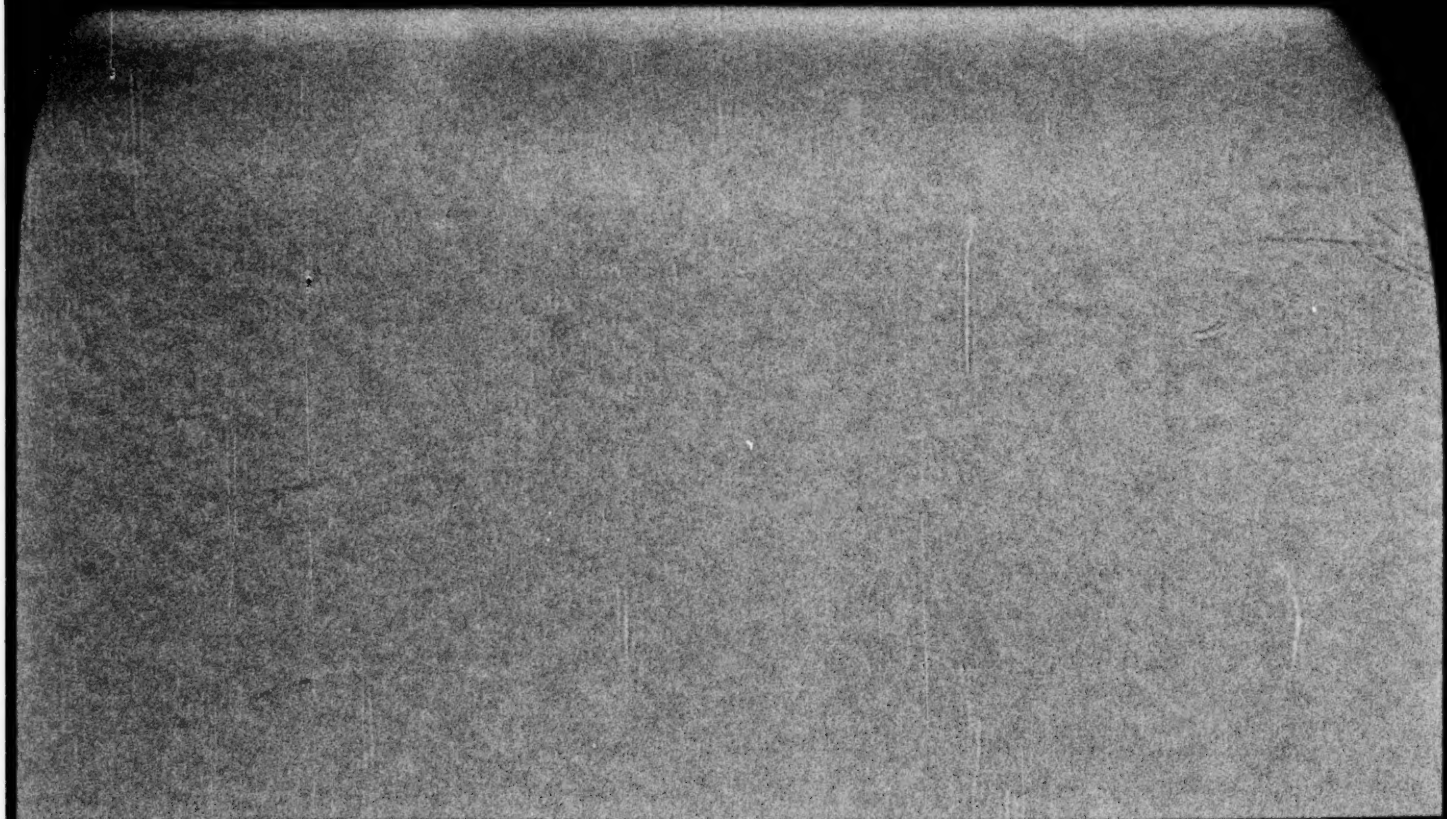
CONCLUSION

Petitioner respectfully contends that there was an arrest by the State officer without probable cause or authority and that the subsequent search and resulting seizures were unlawful and that the District Court erred in failing to grant petitioner's Motion for suppression of the testimony and evidence and that the entire prosecution is tainted. The evidence and testimony should be suppressed and the case dismissed.

Respectfully submitted,

Dale Quillen,
Attorney for Petitioner

APPENDIX



APPENDIX A

Decided and filed April 24, 1972

BEFORE: PECK and MC CREE, Circuit Judges, and MC ALLISTER, Senior Circuit Judge.

PER CURIAM.

This is an appeal from convictions by a jury of conspiracy to violate 26 U.S.C. Chapter 51, regulating the manufacture of distilled spirits and of certain substantive offenses proscribed by that chapter as set forth in a five-count indictment. One of two other co-defendants was acquitted by the jury on all counts and the other failed to appear for trial and is a fugitive. The third count which charged possession of a 1960 Chevrolet automobile intended for use in violation of Chapter 51, Title 26 U.S.C. was dismissed by the court and appellant Edwards was convicted on counts one, four and five, and appellant Pegram was convicted on counts one, two, four and five.

The single issue presented on appeal is whether the District Court erred in denying appellants' motion to suppress certain evidence and testimony which were the consequence of an arrest which appellants contend was unlawful.

An examination of the record reveals that substantially all the evidence and testimony of which appellants complain was lawfully perceived by the law enforcement officers before the alleged arrest occurred and that any evidence obtained after that event was *de minimis* insofar as it may have affected the verdict. Accordingly, we determine that any error was harmless beyond a reasonable doubt. *See Chapman* v. *United States*, 386 U.S. 18 (1967).

APPENDIX B

INDICTMENT

(Filed July 16, 1970)

COUNT ONE

The Grand Jury charges:

From on or about November 1969 and continuously thereafter up to and including May 1, 1970, in the Middle District of Tennessee, NATHANIEL WARDELL EDWARDS, WARDELL PEGRAM, THOMAS R. McCULLOUGH and MOSES POLK, JR., wilfully and knowingly did combine, conspire, confederate and agree together and with each other, and with Tirus T. Foster and other persons whose names are to the Grand Jury unknown, to commit offenses against the United States, that is, to carry on the business of a distiller or rectifier of distilled spirits without having given bond as required by law, in violation of Title 26, United States Code, Section 5601(a)(4); to make or ferment mash fit for distillation and for the production of distilled spirits in a building and on premises other than the designated premises of a distilled spirits plan lawfully qualified to produce distilled spirits, in violation of Title 26, United States Code, Section 5601(a)(7), and to engage in distilling and bottling of distilled spirits while failing to post a sign required by Section 5115(a) and Section 5180(a), Title 26, United States Code, in violation of Title 26, United States Code, Section 5681(a).

To effect the objects of this conspiracy, and in furtherance thereof, the defendants and co-conspirators committed the following overt acts:

1. In or about November 1969, in Williamson County, Tennessee, an individual whose identity is to the Grand

Jury unknown, and who was observed to be an associate of NATHANIEL WARDELL EDWARDS, rented from Edward Hendricks a tenant house, in an outbuilding of which, during the months of March and April 1970, a still was operated.

2. In January 1970, NATHANIEL WARDELL EDWARDS paid Edward Hendricks $35.00 for rent on the aforesaid tenant house.

3. During the months of February, March and April 1970, NATHANIEL WARDELL EDWARDS made numerous trips to the farm in Williamson County, Tennessee, on which the aforesaid tenant house was located in the company of THOMAS R. McCULLOUGH and an unknown person.

4. On or about April 1, 1970, in Nashville, Tennessee, NATHANIEL WARDELL EDWARDS made arrangements with Tirus T. Foster to purchase 1,400 pounds of sugar.

5. On or about April 2, 1970, in Nashville, Tennessee, NATHANIEL WARDELL EDWARDS made arrangements with Tirus T. Foster to load the aforesaid sugar into a 1958 Mercury automobile belonging to NATHANIEL WARDELL EDWARDS, which automobile contained cracked corn and a pair of boots on which was found the residue of fermented mash.

6. On or about April 2, 1970, in Nashville, Tennessee, NATHANIEL WARDELL EDWARDS, WARDELL PEGRAM and MOSES POLK, JR. attempted to transfer the said 1,400 pounds of sugar from the aforesaid 1958 Mercury onto a 1962 Chevrolet pickup truck, which pickup truck was owned by MOSES POLK, JR.

7. On or about April 29, 1970, in Nashville, Tennessee, NATHANIEL WARDELL EDWARDS, WARDELL

PEGRAM and THOMAS R. McCULLOUGH inquired of Tirus T. Foster whether he, Foster, had been contacted by an Agent of the Alcohol, Tobacco and Firearms Division and whether he, Foster, had signed anything.

8. On or about April 30, 1970, in Williamson County, Tennessee, NATHANIEL WARDELL EDWARDS, in the company of WARDELL PEGRAM and THOMAS R. McCULLOUGH, drove an Old Dodge Army utility truck to the tenant house and outbuilding in which a still was located on May 1, 1970, and unlocked and entered the outbuilding.

9. On April 30, 1970, in Williamson County, Tennessee, THOMAS R. McCULLOUGH washed out a fifty-five gallon metal drum and carried it, along with a five gallon can, into the aforesaid outbuilding.

10. On or about May 1, 1970, in Williamson County, Tennessee, THOMAS R. McCULLOUGH and WARDELL PEGRAM were arrested by Agents of the Alcohol, Tobacco and Firearms Division at the aforesaid outbuilding, which outbuilding contained two 1,000 gallon pot stills, 1,500 gallons of mash, and 90 gallons of nontaxpaid whiskey.

11. On May 1, 1970, WARDELL PEGRAM and THOMAS R. McCULLOUGH admitted to Agents of the Alcohol, Tobacco and Firearms Division that they had been operating the aforesaid still for approximately sixty days.

In violation of Title 18, United States Code, Section 371.

COUNT TWO

And the Grand Jury further charges:

On or about May 1, 1970, in the Middle District of Tennessee, WARDELL PEGRAM and THOMAS R. McCULLOUGH did unlawfully have in their possession and custody and under their control a still and distilling apparatus set up which was not registered as required by Title 26, United States Code, Section 5179(a).

In violation of Title 26, United States Code, Section 5601(a) (1).

COUNT THREE

And the Grand Jury further charges:

On or about May 1, 1970, in the Middle District of Tennessee, WARDELL PEGRAM and THOMAS R. McCULLOUGH did have and possess certain property, to-wit: 1960 Chevrolet automobile bearing Vehicle Identification No. 01819N132833 intended for use in violation of Chapter 51, Title 26, United States Code, Sections 5601(a) (1), -(a)(2), -(a)(4), -(a)(7), -(a)(8), -(a)(10), and -(a)(11).

In violation of Title 26, United States Code, Section 5686(a).

COUNT FOUR

And the Grand Jury charges:

On or about April 2, 1970, in the Nashville Division of the Middle District of Tennessee, NATHANIEL WARDELL EDWARDS, WARDELL PEGRAM and MOSES POLK, JR., did unlawfully have and possess certain property, to-wit: 1,400 pounds of sugar in fourteen 100-pound bags

intended for use in violation of Chapter 51, Title 26, United States Code, Sections 5601(a)(1), -(a)(2), -(a)(4), -(a)(7), -(a)(8), -(a)(10), and -(a)(11).

In violation of Title, United States Code, Section 5685(a).

COUNT FIVE

And the Grand Jury further charges:

On or about April 2, 1970, in the Nashville Division of the Middle District of Tennessee, NATHANIEL WARDELL EDWARDS, WARDELL PEGRAM and MOSES POLK, JR., did have and possess certain property, to-wit: a 1958 Mercury automobile bearing Vehicle Identification No. M8ZD533774 and a 1962 Chevrolet one-half ton pickup truck bearing Vehicle Identification No. 2C144N114285 intended for use in violation of Chapter 51, Title 26, United States Code, Sections 5601(a)(1), -(a)(2), -(a)(4), -(a)(7), -(a)(8), -(a)(10), and -(a)(11).

In violation of Title 26, United States Code, Section 5686(a).

A TRUE BILL:

(s) CHARLES H. ANDERSON
United States Attorney

APPENDIX C

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

(September 1[illegible], 1970)

(Tr. 9-24)

John Frederick Behaylo, Sr. — Direct Examination by Mr. Quillen:

THE COURT: Now, members of the jury, there is a preliminary matter in this case that the Court must hear before we can proceed with the trial. I'm going to let you all retire to the jury room. We'll call you back in just quickly as that is disposed of. You may step out.

(Thereupon, the jury of twelve retired from the courtroom, and in their absence the following proceedings were had to-wit:)

THE COURT: All right, Mr. Quillen, we can proceed on your motion to suppress.

MR. QUILLEN: If it please the Court, defendants will call Mr. Behaylo.

THE CLERK: Will you raise your right hand, please? (Witness sworn by the Clerk.) State your full name.

THE WITNESS: John Frederick Behaylo, Sr.

THE CLERK: Spell your last name, please.

THE WITNESS: (Spelling) B-e-h-a-y-l-o.

THE CLERK: Have your seat.

MR. QUILLEN: May it please the Court, any other witnesses to be called by the Government I would like to have placed under the Rule.

THE COURT: Well, does the Government have any witnesses they're going to call?

MR. PARKER: I don't anticipate any right now, Your Honor, but there may be some in the actual trial of the case.

THE COURT: All right, let's do this. Let's let all the witnesses in this case be excluded from the courtroom until you are called. All of you step out until you are called.

(Thereupon, the Rule was invoked and the witnesses were sequestered.)

JOHN F. BEHAYLO, SR.

A witness called at the instance of the Defendants, on Monday, September 14, 1970, having first been duly sworn, was examined and testified as follows:

Direct Examination by Mr. Quillen:

Q. Mr. Behaylo, would you state your full name, your home address and your official position, please?

A. John Frederick Behaylo, Sr. 2304 Milton Drive, Nashville, Tennessee. Patrolman, Metropolitan Police Department.

Q. Were you a patrolman, Metropolitan Police Department, of Nashville, on April 2, 1970?

A. Yes, sir.

Q. On that day, did you have occasion to arrest Nathaniel Wardell Edwards, Wardell Pegram, and Moses Polk, Jr.?

A. I didn't arrest them. I detained them and held them for Federal Authorities.

Q. What time of day did this detention commence?

A. Approximately 7:45 p. m. or 8 o'clock.

Q. Was that just, state where in Nashville that occurred.

A. That happened at First and Broad, beside the State Liquor Store. First Avenue South and Broad Street.

Q. Was it on private property or was it on the street?

A. It was on private parking lot.

Q. Was that the parking lot of the liquor store?

A. Yes, sir.

Q. About how far were these men from the public highway there?

A. Fifteen feet.

Q. What were the men doing when you first saw them?

A. Unloading sugar.

Q. From where?

A. From a white '58 Mercury into a light blue '62 Chevrolet pick-up truck.

Q. Were they doing it there in the wide open for anyone to see it?

A. Yes, sir.

Q. There was no attempt to conceal themselves, was there?

A. No, sir.

Q. Was anyone else with you?

A. Yes, sir.

Q. Who was with you?

A. My partner, Officer Pike.

Q. Is he here today?

A. I don't see him in the court. I don't know whether he is here or not.

Q. Where were you when you first observed that they were unloading sugar?

A. Sitting in the street right next to them.

Q. There was no attempt on their part to conceal whatever they were doing from you so far as you know?

A. They didn't have the opportunity.

Q. I beg your pardon?

A. They didn't have the opportunity to. I just drove up there and observed them.

Q. I say, there was no attempt—

THE COURT: Were they already doing it when you drove up?

THE WITNESS: Yes, sir.

THE COURT: All right, go ahead.

By Mr. Quillen:

Q. Now, could you see from where you were what it was that was in the—how was this sugar contained?

A. In one hundred pound bags.

Q. Well, could you see from where you were what it was?

A. Yes, sir.

Q. Were you personally acquainted with any one of those three men at that time?

A. I knew two of them.

Q. Which two did you know?

A. Mr. Polk and Mr. Pegram.

Q. Did you have any warrant for their arrest?

A. No, sir.

Q. How long did you detain the men?

A. Until I could find out what was going on, until the Federal authorities could get there. Just quick as I could notify them to come.

Q. What did you first do when you approached these men?

A. Asked them what they were doing.

Q. What did they tell you?

A. They were unloading sugar. Car had broke down and they were loading in the pick-up truck.

Q. Then what happened after that? Did you tell them that you were going to hold them there?

A. I told them, asked them what they were doing about the sugar. They told me that they were getting it for a fellow that worked out at Siegrist's Bakery. I think one of the defendants contacted the man out there and he said he didn't know anything about it. That he would come

down and try to clear it up. When he got there, he said that he didn't know any of the defendants. They did not work for him and they had no order from him whatsoever to have any sugar.

Q. Which man told you they were working at Siegrist's Bakery getting it for Siegrist's Bakery?

A. Mr. Pegram was the one that called.

Q. Well, now, didn't they tell you they were getting it for a man by the name of Tyrus Foster?

A. Told me getting it for a man by the name of Tee. Didn't know his name. Said they just knew him by the name of Tee.

Q. Do you know whether or not the sugar was later claimed by a man by the name of Tyrus Foster?

A. No, sir, I don't.

Q. You were, of course, at that time, a Metropolitan police officer? You were not working with any pre-arrangement with the Federal Government, were you?

A. No, sir.

Q. You never have been a Federal officer?

A. No, sir.

Q. Now, did these men, did you tell them they couldn't leave?

A. No, sir.

Q. How long did you stay there with them, though, until some Federal officer arrived?

A. Approximately an hour.

Q. Did they, where were they during that time?

A. They were standing there with me.

Q. You didn't place them in a police car?

A. No, sir, not until the Federal authorities arrived.

Q. You didn't make any suggestion at all to them that you wanted them to wait there for the Federal officers?

A. I asked them if they would wait and they said that they would.

Q. Of course, you were armed and in uniform at that time?

A. Yes, sir.

Q. Did you have any warrant for the arrest of any of those three men?

A. No, sir.

Q. Did you have any warrant for the seizure of their car or the contents, the sugar?

A. No, sir.

Q. Was one ever obtained?

A. I understand it was by the Federal authorities. I didn't obtain it.

Q. Were these men later arrested that evening?

A. Yes, sir.

Q. By whom?

A. By one of the Federal officers.

Q. Where were they taken after they were arrested?

A. I don't know. They were taken from my possession.

Q. Now, so far as this sugar was concerned and so far as you know, it was perfectly legal so far as the laws of the State of Tennessee or the Metropolitan Police Department are concerned?

MR. PARKER: I object to leading, Your Honor.

THE COURT: Well, he can ask him. It is all right.

By Mr. Quillen:

Q. Can you answer that?

A. I know of no particular law that says they can't possess that sugar, but the reason—

Q. (Interposing) Were you detaining them there for some State violation of any State law?

A. No, sir.

Q. Of course, you know that some Federal officer later came and took the three men and the vehicle and the sugar, seized it from them and placed them in jail?

A. Yes, sir.

MR. QUILLEN: That is all.

Cross-Examination by Mr. Parker:

Q. Mr. Behaylo, you stated on direct examination that you knew the defendants Pegram and Polk?

A. Yes, sir.

Q. At the time you drove by there, you recognized them, is that correct?

A. Yes, sir.

Q. How is it that you knew them?

A. From familiar with them, working in the area where they reside. Through the North Nashville area and know—

Q. (Interposing) Did you know them to be engaged in any kind of business involving possibly the use of sugar?

A. No, sir, not other than making whiskey. I knew that they had been involved in the manufacturing of illegal whiskey.

Q. Knew that they had been involved in the manufacture of white whiskey?

A. Yes, sir.

Q. What about the Defendant Nathaniel Edwards, did you know anything about him?

A. No, sir.

Q. Now, you stated that this was a '62 Chevrolet pick-up truck, is that correct?

A. Yes, sir.

Q. And '58 white Mercury, is that correct?

A. Yes, sir.

Q. Did you ask anybody who the '62 pick-up truck belonged to?

A. Yes, sir.

Q. And what did they or any one of them say?

A. Mr. Polk said it was his truck.

Q. And what about the '58 Mercury, did anybody claim to own that?

A. Didn't know who owned it.

Q. Nobody knew who owned that?

A. No, sir. Told me that a man drove up there and left it. Fellow called them and told Mr. Polk come down there, get the sugar out of it. They didn't know who it belonged to. Man that was driving the car had walked off and left it.

Q. Now, did you look into the Mercury automobile?

A. Yes, sir.

Q. Did you open the trunk of the automobile?

A. Trunk was already open.

Q. All right. Did you look in the trunk of the automobile?

A. Yes, sir.

Q. What did you observe in the trunk of the automobile?

A. Sugar.

Q. What did you observe in the back seat, if there was a back seat?

A. Back seat had been removed and there was sugar in there.

Q. Did the trunk of the automobile stay open all the time you were there?

A. Yes, sir.

Q. When the Federal agents came, was the trunk still open?

A. Yes, sir.

MR. PARKER: I believe that is all. Well, wait a minute.

Q. (Mr. Parker continuing) Mr. Behaylo, I want you to explain to His Honor what your reason for—what was your reason for stopping here and investigating this incident?

A. I stated to the Court I was familiar with Mr. Polk and Mr. Pegram. Knew that they had been active in the past in manufacturing and distributing of illegal whiskey.

I saw this sugar being unloaded. Saw that it was sugar. And figured that quantity of sugar that they had and having been engaged before in the manufacturing of whiskey that this probably is what it was being used for. And thought it was my duty as an officer to investigate it, find out what I could find out about it.

MR. PARKER: That is all.

Redirect Examination by Mr. Quillen:

Q. How long have you been an officer of the Metropolitan Police Department?

A. Six and a half years.

Q. When was it you had known that Mr. Polk was active in the manufacture of liquor?

A. Up until about two years ago, I worked in North Nashville.

Q. Have you ever known of that man being arrested for the manufacture of liquor?

A. I know he runs with people and people he associates with are active in it, engaged in the stills and stuff, yes, sir.

Q. I'm talking about Mr. Polk personally, not about his associates.

A. Not Mr. Polk. I've never known him—I have never arrested him for it, I will say.

Q. Well, you didn't have any information that Mr. Polk was ever arrested for manufacturing any whiskey, did you?

A. No, sir.

Q. And isn't it also true that that would be the same situation as to Wardell Pegram?

A. No, sir.

Q. Have you ever known of Wardell Pegram being arrested for the manufacture of liquor?

A. I believe he has been arrested for it in the past.

Q. For manufacturing whiskey?

A. Possession of whiskey.

Q. Oh, well, did you just say a little bit ago that you knew these men to have the reputation for manufacture of whiskey?

A. Possession and manufacture. They had been engaged in the whiskey operations, what I meant to say.

Q. Do you recall seeing a black Cougar automobile down there that night?

A. Yes, sir, there was a Cougar automobile across the street.

Q. I will ask you if Mr. Edwards wasn't sitting in the Cougar automobile at a time when you went over there and told him he couldn't leave?

A. No, sir.

Q. Do you deny that that happened?

A. Yes, sir.

Q. Did you see him in the Cougar automobile at all?

A. Yes, sir.

Q. Did you see him, well, then, how come he didn't leave, do you know?

A. I asked him to come back across the street until we could clear this matter up.

Q. And he responded to your request, is that correct?

A. Yes, sir.

Q. How soon was that after you arrived there?

A. Fifteen, maybe fifteen minutes.

Q. And you kept him over there then for another forty-five minutes trying to clear up the matter?

A. Yes, sir.

Q. Now, it is true that you called a good many officers there, you or some other police officer did, trying to find out something about this sugar, didn't you?

A. Yes, sir.

Q. How many officers did you call?

A. Well, I notified my sergeant and one of the Youth Officers came up. I was trying to contact one off the Vice Squad and I couldn't get hold of them. Finally got hold of the Federal authorities and they came down. Of course, on that corner several cars come by and different policemen wanted to stop and see what was going on, see if needed any help.

Q. But, now, do I understand you correctly now it is your testimony that you had some information about Mr. Polk and Mr. Pegram maybe possessing some liquor but you had no information about either one of them ever manufacturing any, is that right?

A. Yes, sir, they had been active in the liquor business I will say this, I mean, either transporting it, possessing it or manufacturing it in some way.

Q. But you didn't know anything specifically about either one of them ever manufacturing any whiskey?

A. No, sir.

Q. And you don't know whether—had you ever arrested Wardell Pegram?

A. No, sir.

Q. And the whiskey you had heard about, you didn't know to your own knowledge whether the Federal Tax had been paid on it or whether it hadn't, did you?

A. Not at the particular time, no, sir.

MR. QUILLEN: That is all.

MR. PARKER: Come down.

MR. QUILLEN: That is the Defendants' case as far as the motion is concerned, if Your Honor please.

THE COURT: All right, Mr. Parker.

MR. PARKER: May it please the Court, I don't have anything to offer.

THE COURT: All right, you all want to argue it?

MR. QUILLEN: No, sir.

THE COURT: You want to argue it, Mr. Parker?

MR. PARKER: Just to say this, if Your Honor please, I think there is ample evidence that there was probable * * *

(Tr. 134)

William L. Wright - Direct Examination by Mr. Parker

Q. Mr. Wright, what was the response when you asked him who owned the distillery?

A. Wardell Pegram, the defendant in the yellow shirt stated that it was his distillery and also stated that it had been there approximately sixty days.

* * *

(Tr. 103)

DeWitt C. Rollins - Direct Examination by Mr. Parker

Q. Mr. Rollins, by whom are you employed?

A. Alcohol and Tobacco and Firearms Division, U.S. Treasury Department.

Q. Were you so employed back in April, 1970?

A. I was.

Q. Mr. Rollins, when did you first become involved in this case involving the three defendants here?

A. April 2nd, 1970.

Q. What was the occasion?

A. I went to the State Liquor State at First and Broad in Nashville and there I saw the three defendants in the custody of Officer Behaylo.

MR. QUILLEN: Of course, our objection applies to his testimony also.

* * *

(Tr. 104-105)

Q. Did you take anything out of the Mercury automobile?

A. Yes, sir, out of the trunk of the Mercury automobile I gathered some cracked corn and some spillings of sugar out of the trunk of the Mercury automobile.

Q. Any other objects that you examined in the Mercury automobile?

A. One pair of boots.

MR. QUILLEN: I'm going to object again to this continuing search.

THE COURT: All right, go ahead.

* * *

(Tr. 96)

John F. Behaylo, Sr. - Direct Examination by Mr. Parker

Q. Mr. Behaylo, you are a Metropolitan Police Officer, is that right?

A. Yes, sir.

Q. Were you employed as such back in April, 1970?

A. Yes, sir, I was.

Q. Are you in the Patrol Division?

A. Yes, sir.

Q. Mr. Behaylo, I want to call your attention back to April 2, 1970 and ask you if you were involved with an incident involving some sugar down at First and Broad?

A. Yes, sir, I was.

Q. Will you explain the facts, the circumstances, what happened?

MR. QUILLEN: If Your Honor please, in view of the prior ruling of the Court I again renew our objection to this testimony.

THE COURT: Overruled. Go ahead.

MR. QUILLEN: Note an exception.

APPENDIX D

MOTION TO SUPPRESS TESTIMONY

(Filed September 11, 1970)

Comes the defendants, Nathaniel Wardell Edwards, Wardell Pegram and Moses Polk, Jr., and move the Court for an order suppressing testimony of officers of the Nashville Metropolitan Police Department and agents of the Internal Revenue Service insofar as said testimony may pertain to a 1962 Chevrolet pickup truck and 1400 pounds of sugar which was seized from said defendants on or about April 2, 1970, in Nashville, Tennessee, by said officers without a warrant of search or seizure or other lawful authority therefor.

Said defendants, and particularly Nathaniel Wardell Edwards, further move the Court to suppress testimony of said agents insofar as it may pertain to the search of a 1958 Mercury automobile on or about April 2, 1970, insofar as said testimony may pertain to cracked corn and a pair of boots.

Respectfully submitted,

.....

Dale Quillen
Attorney for Defendants

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1629

NATHANIEL WARDELL EDWARDS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Following a jury trial in the United States District Court for the Middle District of Tennessee, petitioner, together with a co-defendant named Pegram, was convicted of conspiracy to operate an illegal distillery in violation of 26 U.S.C. 5601 and 5681 (Count I). He was also convicted on two counts charging substantive violations of the federal liquor laws, 26 U.S.C. 5686 (Counts IV and V).[1] Petitioner was sentenced to two years' imprisonment on Count I with eligibility for parole at such time as the Board of Parole may determine (18 U.S.C. 4208(a)(2)). The district court suspended imposition of sentence on the remaining

[1] Co-defendant McCullough failed to appear for trial and his case was severed. Co-defendant Polk was acquitted on all counts.

counts and placed petitioner on probation for a period of five years to commence upon his release from imprisonment (Tr. 213–214).[2] The court of appeals affirmed *per curiam* (Pet. App. A).

The evidence showed that on April 2, 1970, at approximately 8:00 p.m., petitioner and two co-defendants were openly transferring fourteen 100-pound bags of sugar from a disabled car to a truck in a parking lot in Nashville, Tennessee. Local officers Behaylo and Pike, on a routine patrol, observed the activity and stopped to investigate. At the hearing on petitioner's motion to suppress, officer Behaylo testified that he had recognized two of the men in the parking lot, Pegram and Polk, both of whom he knew to have been "active in the liquor business, * * * either transporting it, possessing it or manufacturing it * * *" (Tr. 23). The three men claimed they were getting the sugar for a baker, who, following a telephone call from one of the defendants, came to the parking lot and told the officer that he did not know the men and that they had no order from him for sugar (Tr. 14). The officer then detained the three men and notified the federal authorities, who arrived within an hour (Tr. 11, 15–16). When the federal agents arrived, they saw in the open trunk of the disabled automobile cracked corn, spilled sugar, and boots that had the odor of fermented mash (Tr. 19–20, 104–105, 113). Petitioner and his companions were thereupon arrested by the federal agents (Tr. 16). This incident

[2] "Tr." refers to the transcript of trial proceedings in this case.

formed the basis for one of the substantive charges (Count IV) of which petitioner was convicted.

Some three weeks later, on April 23, 1970, Treasury agents discovered a still site allegedly operated by petitioner and his co-defendants on an outlying tenant-farm (Tr. 113–114).[3] Surveillance conducted during the following week showed that the site was visited by petitioner (who apparently was then out on bail) and two of his co-defendants. Based on these and other observations made by agents, a search warrant was obtained, and, on May 1, 1970, the site was raided. (Tr. 105–109, 116–123, 129–134.) Two 1,000-gallon pot stills, 1,500 gallons of mash, and 90 gallons of nontax-paid whiskey were located at the site (Tr. 106).

Petitioner's sole contention is that the evidence relating to the sugar-transfer incident was the product of an illegal arrest and should have been suppressed at trial. The record, however, provides ample support for the conclusion that there was no arrest prior to the arrival of the federal agents, that if there was an arrest it was lawful, and that if there was an unlawful arrest the evidence was not a product of it.

Officer Behaylo testified that he did not place the men under arrest (Tr. 11) but rather "asked them if they would wait and they said that they would" (Tr. 16). He did not tell them they could not leave (Tr. 15, 22). The defense offered no evidence to show that

[3] The tenant, a government witness, had rented a house and outbuilding on the farm in November 1969 to a man he knew only as "George". Subsequently, he saw both "George" and petitioner at the site, and on one occasion petitioner had paid the monthly rent due on the buildings. (Tr. 68–70.)

petitioner understood the officer's question to be a restraint on his freedom. See *Terry* v. *Ohio,* 392 U.S. 1, 16. Even assuming that in these circumstances there can be said to have been an arrest, the record shows that officer Behaylo had probable cause to believe that an offense was being committed in his presence. He observed the men, two of whom he knew to be involved in the illegal liquor business, transferring from a car to a truck a large amount of sugar [4] during the evening hours. And if this were not enough, the officer's judgment that the sugar was being used for illegal whiskey (Tr. 20) was fortified when the baker to whom the suspects supposedly were to deliver the sugar stated that he neither knew the men nor ordered sugar from them (Tr. 14).

Finally, most of officer Behaylo's testimony concerned observations made by him before he even approached the men or while approaching them "for purposes of investigating possibly criminal behavior." *Terry* v. *Ohio, supra,* 392 U.S. at 22. Even if he lacked probable cause for an arrest, he was not required "to simply shrug his shoulders and allow a crime to occur or a criminal to escape." *Adams* v. *Williams,* No. 70-283, decided June 12, 1972, slip opinion p. 2.[5]

[4] The officer testified: "Well, it is uncommon, you know, to see somebody with this much sugar" (Tr. 99).

[5] A federal agent testified concerning the cracked corn, spilled sugar, and boots seen in the car (Tr. 104–105). The court of appeals properly characterized this as *de minimis* under the circumstances, and concluded that any error in admitting the testimony was harmless beyond a reasonable doubt (Pet. App. A).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

JULY 1972.

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